No. 15912

In the United States Court of Appeals for the Ninth Circuit

CONTINENTAL TRADING, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
A. F. PRESCOTT,
MEYER ROTHWACKS,
Attorneys,
Department of Justice,
Washington 25, D. C.

FILED

JUL 17 1958

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and Regulations involved	2
Statement	2
Summary of argument	10
Argument:	
I. The Tax Court correctly held that during the taxable years taxpayer was not engaged in trade or business within the United States within the meaning of Section 231(b) of the Internal Revenue Code of 1939, and consequently did not qualify as a resident foreign corporation for tax purposes	12
A. The applicable legal principles	13
B. The facts	17
II. The Tax Court correctly denied taxpayer's motion for leave to file a motion to vacate the decision, to reopen the proceeding, and to take further testimony	27
Conclusion	35
Appendix	36

CITATIONS

Cases:

Commissioner v. *Scottish American Co.*, 323 U.S. 119	16
Edwards v. *Chile Copper Co.*, 270 U.S. 452	13, 14
Ehrman v. *Comissioner*, 120 F. 2d 607	15
Flint v. *Stone Tracy Co.*, 220 U.S. 107	14, 20
Goodyear Inv. Corp. v. *Campbell*, 139 F. 2d 188	15
Gregory v. *Helvering*, 293 U.S. 465	25
Harmar Coal v. *Heiner*, 34 F. 2d 725, certiorari denied, 280 U.S. 610	15
Helvering v. *Scottish American Inv. Co.*, 139 F. 2d 419, affirmed, 323 U.S. 119	13
Higgins v. *Commissioner*, 312 U.S. 212	14
Katz v. *Commissioner*, 188 F. 2nd 597, 959 (C.A. 2nd)	34

Cases—Continued | Page

Lewellyn v. *Pittsburgh, B. & L. E. R. Co.*, 222 Fed. 177 15
Linen Thread Co. v. *Commissioner*, 14 T.C. 725 .... 15, 25
McCoach v. *Minehill Railway Co.*, 228 U.S. 295 15
Scottish American Investment Co. v. *Commissioner*, 12 T.C. 49 15
Section Seven Corp. v. *Anglim*, 136 F. 2d 155 .... 14, 15, 19
Spermacet Whaling & Shipping Co. v. *Commissioner*, decided June 13, 1958 20
United States v. *Emery*, 237 U.S. 28 15
United States v. *Fauci*, 242 F. 2d 237 34
United States v. *Peabody Co.*, 104 F. 2d 267 15
Von Baumbach v. *Sargent Land Co.*, 242 U.S. 503 14
Zonne v. *Minneapolis Syndicate*, 220 U.S. 187 15

Statute:

Internal Revenue Code of 1939, Sec. 231 (26 U.S.C. 1952 ed., Sec. 231) 36

Miscellaneous:

H. Rep. No. 2333, 77th Cong., 1st Sess., p. 103 (1942-2 Cum. Bull. 372, 449-450) 18
8 Mertens, Law of Federal Income Taxation:
Sec. 45.20 .... 13, 14
Sec. 45.25 .... 13, 14, 15
Rules of Practice, Tax Court of the United States (Rev. January 15, 1958):
Rule 19 .... 27, 31
Rule 20 32
Rule 27 32
Treasury Regulations 111:
Sec. 29.231-1 36
Sec. 29.231-2 36

In the United States Court of Appeals for the Ninth Circuit

No. 15912

CONTINENTAL TRADING, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

---

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 43-55) are not reported.

JURISDICTION

The petition for review (R. 86-88) involves income tax deficiencies for the calendar years 1948, 1949, and 1950.[1] A notice of deficiency covering all of the

---

[1] Amounts involved are as follows (R. 43):

Year	*Deficiency*
1948	$208,300.59
1949	151,559.71
1950	114,468.53
	$474,328.83

taxes involved was mailed to the taxpayer to an address outside of the United States, on June 28, 1954. (R. 14-18.) On November 4, 1954, the taxpayer filed a petition in the Tax Court for redetermination of the deficiencies, pursuant to provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 6-15.) The decision of the Tax Court was entered on September 4, 1957. (R. 56.) The case is brought to this Court by petition for review filed by the taxpayer on December 3, 1957. (R. 86-88.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that during the taxable years the taxpayer was not engaged in trade or business within the United States within the meaning of Section 231(b) of the Internal Revenue Code of 1939, so as to qualify as a resident foreign corporation for tax purposes.

2. Whether the Tax Court correctly denied the taxpayer's motion for leave to file a motion to vacate its decision and to reopen the proceeding for the purpose of taking further testimony.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations will be found in the Appendix, *infra*.

STATEMENT

The facts, as stipulated by the parties (R. 20-42), and as found by the Tax Court (R. 44-51), are as follows:

Continental Trading, Inc., a Panamanian corporation organized in May, 1947, hereafter referred to as the taxpayer, maintained its principal office in Mexico City, Mexico. It filed its federal income tax return for 1948 with the Collector of Internal Revenue for the First District of California, and its 1949 and 1950 returns with the Collector of Internal Revenue for the District of Nevada. Those returns stated that the taxpayer was a resident foreign corporation with "Investment" as its principal activity. (R. 44.)

The taxpayer qualified as a foreign corporation in Nevada in March, 1948, and continued to be so qualified until March, 1951. It used for its American address that of a Reno, Nevada, company that acted as resident agent for the taxpayer and other foreign corporations. It represented that it maintained only one place of business in the United States. (R. 44.)

Grover Turnbow, a United States citizen with offices in Oakland, California, served as the taxpayer's president. After March, 1948, at the suggestion of the California attorney who served as the taxpayer's vice president, Turnbow had the taxpayer's name added to the business names already appearing on his Oakland office door and on the building directory. The names were: International Dairy Association, Inc., International Dairy Engineering Co., and International Dairy Supply Company, hereafter referred to as Association, Engineering, and Supply, respectively. Turnbow was president and sole stockholder of Supply. The taxpayer never used the Oakland address on its letterheads or otherwise, and paid no rent for the Oakland office. (R. 44-45.)

The taxpayer represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000. Wenner-Gren held substantial amounts of stock in the Electrolux and Servel Corporations, as well as sizable and diverse holdings in Mexican and other foreign enterprises. Prior to the taxpayer's incorporation, Turnbow served as attorney in fact in the United States for Wenner-Gren, who was then borrowing large sums from American lending institutions for use outside the United States. (R. 45.)

Turnbow became acquainted with Wenner-Gren in Mexico when he erected a recombined milk plant in which Wenner-Gren had a financial interest. Turnbow unsuccessfully sought to interest Wenner-Gren in financing the supplying of milk by Supply to the armed forces in the Far East. (R. 45.)

Turnbow and his various enterprises were interested in erecting recombined milk plants in foreign countries. Prior to and during the years here involved, the program failed to materialize because of the inability to reconvert foreign currency into American dollars, and because of the instability of foreign currencies. (R. 45.)

Turnbow hoped that the taxpayer would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to secure funds, but without any voice or activity in the operations of the plants. The taxpayer never undertook any activity in connection with the establishment

of such recombined milk plants, and never used its assets and borrowings for this or any related purpose. (R. 45-46.)

After the taxpayer's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired his stock in the Electrolux and Servel Corporations, which it thereupon pledged as security for loans. As of the beginning of 1948, the taxpayer had assumed indebtednesses of Wenner-Gren as follows (R. 46):

Bank of America, N. T. & S. A., $1,100,000;
Central Hanover Bank and Trust Company, New York, $480,000;
Teleric, Inc., $926,000.

The taxpayer liquidated the loan from Central Hanover Bank during 1948. The loan from Teleric, Inc., remained outstanding as of the end of 1950. It liquidated the loan from Bank of America in August, 1948. (R. 46.)

From 1948 through 1950, the taxpayer had no paid employees in the United States. Turnbow received $1,500 per month during the last 6 months of 1950, denominated as salary for his services to the taxpayer. This represented part of an over-all settlement effectuated in June, 1950, between Turnbow and Wenner-Gren, as individuals, whereby Turnbow would receive from Wenner-Gren stock and cash totaling $105,000. The settlement covered, among other items, Turnbow's services to Wenner-Gren from October, 1946, through June, 1950. (R. 46-47.)

The taxpayer maintained no books of account in the United States. Its only records consisted of bank

statements, check books, and documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland. It maintained bank accounts in the United States at the First National Bank, Reno, Nevada, and at the Bank of America, N. T. & S. A. in San Francisco. (R. 47.)

The taxpayer's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances. (R. 47.)

The taxpayer reported on its tax returns for the years in question that it derived more than 50 per cent of its gross income from sources outside the United States. It reported gross income from sources within the United States, as follows (R. 47):

1948	$817,791.39
1949	605,635.10
1950	446,863.19

Of the 1948 gross income, $823,635.50 represented dividends on Electrolux and Servel stock. The difference was represented by a reported net loss of $5,-844.11, resulting from sales of property other than capital assets. Of the 1949 gross income, $602,125.20 represented dividends, and $3,509.90 represented "Other Income in the United States." Of the 1950 gross income, $441,624 represented dividends from the Electrolux Corporation, and $5,239.19 represented additional income "From Sales." (R. 47.)

During 1948, the taxpayer's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments of principal and interest on outstanding loans. (c) In May, it borrowed $1,000,000 from the

Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies. (d) On August 6, it borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the bank, which the taxpayer had assumed. On that same date the taxpayer drew checks in excess of the balance $750,000 to make payments of principal and interest on other outstanding indebtedness. (R. 48.)

During 1949, the taxpayer's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments on principal and interest on outstanding loans. (c) It secured and repaid short-term advances from Turnbow. (d) In September, it borrowed $1,700,000 from the Bank of America, used to liquidate the outstanding balances of two loans from that bank. (e) In December, it sold its 55,000 shares of Servel stock, theretofore pledged with the Bank of America to secure loans. It used the proceeds of the sale to pay outstanding obligations to the bank. (R. 48.)

During 1950, the taxpayer's activities in the United States included the following: (a) It collected dividends on Electrolux stock. (b) It made payments on principal and interest on outstanding loans. (c) On January 3, it borrowed $2,000,000 from the Central Hanover Bank. It used the bulk of this loan to repay the $1,700,000 loans from the Bank of America. It transferred approximately $400,000 to its account in Mexico City, $110,000 for the account of a Swedish bank, and approximately $275,000 to its account at the Bank of America, much of which was thereafter

transferred to the taxpayer's Mexican accounts. (d) It repaid the $2,000,000 loan. In its negotiations with the Central Hanover Bank, the taxpayer represented itself as a Panamanian corporation, doing business in foreign countries. (R. 48-49.)

The funds borrowed by the taxpayer were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use. (R. 49.)

In July 1948, the taxpayer engaged in a transaction of a type in which it was not previously nor subsequently engaged. It purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75. Through Association, a company in which Turnbow was interested, it resold the fat 1 month later to Kraft for $40,248. Association requested that Kraft made the check payable to the taxpayer. The taxpayer reported the loss in its 1948 tax return.

As an accommodation to a Mexican corporation, the taxpayer purchased, in 1950, equipment for that corporation for which it was reimbursed without profit. (R. 49.)

In each year, the only other activity reported by the taxpayer was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948, such reported income amounted to $120.64; in 1949, $3,509.90; in 1950, $5,239.19 (R. 49-50.)

In connection with its contract for supplying recombined milk products to troops in the Far East, Supply found it necessary, commencing in 1948, to obtain tin cans. The contracts set forth specifications for the necessary cans to be bought in the United

States. In 1948, Supply procured the cans from Western Can Company, hereafter referred to as Western. An employee in Supply's procurement department ordered the necessary number of cans by telephone, and followed up with a written purchase order. Supply received shipments for which it paid by check. (R. 50.)

In December, 1948, the taxpayer undertook to place with Western, in its own name, an order covering precisely the same type of cans and bearing the same markings as Supply had theretofore ordered in its own name from Western. Western billed the taxpayer at the same price which Supply had paid Western on an earlier order. That order, in the taxpayers' name, was first telephoned to Western by either Supply's procurement department or Turnbow's secretary, on December 8, 1948. The Western saleman who received the order filled out an order form in the name of Supply, but the taxpayer's name was added later. (R. 50.)

On the day that the order was telephoned to Western, Supply prepared an export purchase order for the cans, addressed to the taxpayer. Supply had used the same form in preparing its orders theretofore forwarded directly to Western. The taxpayer then forwarded to Western a written confirmatory order in its name. The taxpayer's check dated December 16, 1948, extinguished the obligation to Western for the cans. Supply paid an invoice on the taxpayer's letterhead for the cans at a 5 per cent increase in price within 10 days of the invoice date. (R. 50-51.)

In 1949, the taxpayer utilized the same recording and routing of orders for cans needed by Supply on 37 occasions. It derived the proceeds reported as income on its 1949 returns because it billed Supply at 5 per cent more than it was billed by Western. In 1950, it utilized the same recording and routing on approximately 48 occasions, and derived the reported profit from sales transactions from this operation. (R. 51.)

There was no business purpose connected with the can transactions engaged in by the taxpayer. It never used its Nevada office in these operations. It carried no inventory of cans, and ordered no cans other than those used by Supply. In every instance in which Supply acquired cans in this way, it paid the taxpayer within 10 days of the taxpayer's payment to Western. (R. 51.)

After 1950, Supply recommenced ordering and purchasing of cans directly from Western. (R. 51.)

The Tax Court found that during 1948, 1949, and 1950, the taxpayer was not engaged in trade or business within the United States. (R. 51.)

SUMMARY OF ARGUMENT

I. The Tax Court correctly held that taxpayer was not "engaged in trade or business within the United States", within the meaning of Section 231(b) of the 1939 Code. Taxpayer was organized primarily to finance the production of recombined milk plants. The Tax Court found that it did not engage in this activity during the taxable years. It earned no income from such activity. On the contrary, its re-

ported gross income for the taxable years was derived—to the extent of approximately 99%—from the collection of dividends from Servel and Electrolux, two domestic corporations whose stock had been transferred to it by Axel Wenner-Gren. Its activities, other than the collection of dividends, resulted, as the Tax Court found (R. 53-55), "in no substantial gain, and considering the time spent on them * * * could not, and in several instances actually did not, result in even a nominal net profit." They were marked by an "obvious lack of business purpose", and were "dictated not by a business objective but purely by a desire to save taxes". In addition, the transactions which taxpayer relied upon as constituting business activity in the statutory sense were considered by the Tax Court as "isolated activities", having "neither [the] consistency nor frequency * * * which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue".

II. The Tax Court correctly denied taxpayer's motion for leave to file the motion to vacate the decision, to reopen the proceeding, and to take further testimony. The motion was filed beyond the 30-day period after the decision had been entered, in contravention of Rule 19(e) and (f) of the Tax Court's Rules of Practice. Nor did taxpayer submit with the motion any information disclosing any possible ground for granting it, even if it had been timely made. In any event, the information which taxpayer orally represented as indicating that there was newly-

discovered evidence fell far short of the mark. At the most, taxpayer in effect merely alleged at the hearing on the motion that, at the trial, prior counsel had failed, and without good reason, to offer in evidence material that was then in existence. The Tax Court correctly viewed the motion proceedings as, in substance, an attempt by newly engaged counsel to retry the case.

ARGUMENT

I

The Tax Court Correctly Held That During the Taxable Years Taxpayer Was Not Engaged In Trade Or Business Within the United States, Within the Meaning of Section 231(b) of the Internal Revenue Code of 1939, and Consequently Did Not Qualify As A Resident Foreign Corporation for Tax Purposes

The primary issue in this case is whether, during the years in question, taxpayer, a Panamanian corporation, qualified as a resident foreign corporation by engaging "in trade or business within the United States" within the meaning of Section 231(b) of the Internal Revenue Code of 1939 (Appendix, *infra*). As taxpayer concedes (Br. 17-18), if it so qualified it could claim certain substantial tax advantages which would otherwise not be available to it as a non-resident foreign corporation. The Tax Court found that (R. 51) "During 1948, 1949 and 1950, petitioner was not engaged in trade or business within the United States". In reaching that conclusion, it applied to taxpayer's (R. 53-54) "detailed analysis * * * of all of its transactions during the years in controversy" certain tests which have been judicially ap-

plied in this area of the law, in the application of which it determined that, except for "items accounting for a fraction of 1 per cent of petitioner's total income", all of the remaining transactions could not "by any stretch of the imagination * * * be considered business", since (a) notwithstanding petitioner's categorical statement to the contrary, they were transactions with an "obvious lack of business purpose", and (b), viewed (R. 55) "*as a whole*[2] * * * there was neither consistency nor frequency in those few isolated activities which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue".

A. *The applicable legal principles*

The question whether a corporation is engaged in business activity within the meaning of the federal tax statutes has received extensive judicial consideration in a variety of contexts. See 8 Mertens, Law of

---

[2] The underscoring is supplied because taxpayer's argument in this Court is, in substantial part (Br. 20-51), mainly an attack on the Tax Court's alleged piecemeal and fragmentary approach to this case. We think, however, that the Tax Court's careful marshaling and evaluation of the evidence demonstrate that it did not "let the fagot be destroyed by taking up each item of conduct separately and breaking the stick", but in fact judged "The activities and situation [of taxpayer] as a whole." *Edwards* v. *Chile Copper Co.*, 270 U.S. 452, 455-456. Contrary to taxpayer's contention, it viewed "the composite picture of * * * [taxpayer's] activities and powers * * * as an integrated whole and a solution * * * [was] sought accordingly". *Helvering* v. *Scottish American Inv. Co.*, 139 F. 2d 419, 422 (C.A. 4th), affirmed, 323 U.S. 119.

Federal Income Taxation, Sections 45.20 and 45.25. In *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, involving the question whether a corporation was carrying on business within the meaning of the so-called Corporation Tax Act, the Supreme Court "adopted with approval the definition judicially approved in other cases, which included within the comprehensive term 'business that which occupies the time, attention and labor of men for the purpose of livelihood or profit' ". *Von Baumbach* v. *Sargent Land Co.*, 242 U.S. 503, 515. See also *Higgins* v. *Commissioner*, 312 U.S. 212, 217. In the *Sargent Land Co.* case, the Supreme Court held that a corporation was doing business if it was (pp. 156-157) "active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain in such activities as are essential to those purposes". And in *Edwards* v. *Chile Copper Co.*, 270 U.S. 452, in considering whether a corporation was subject to a tax on capital stock valuation (p. 453) "with respect to carrying on or doing business", the Supreme Court concluded that the corporation was within the taxing Act since (p. 455) "it was organized for profit and was doing what it was principally organized to do in order to realize profit". The Court further stated that the exemption " 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursing the ends for which the corporation was organized, in the cases where the end is profit".

In *Section Seven Corp.* v. *Anglim*, 136 F. 2d 155, 158, this Court held that a corporation was doing business within the meaning of the tax statute there

involved where, despite the paucity of its activities, it was nevertheless "organized for profit *and was doing what it was principally organized to do in order to realize a profit*". (Emphasis supplied.) See also *Ehrman* v. *Commissioner*, 120 F. 2d 607, 610 (C.A. 9th); *United States* v. *Peabody Co.*, 104 F. 2d 267, 269 (C.A. 6th); *Harmar Coal* v. *Heiner*, 34 F. 2d 725 (C.A. 3d), certiorari denied, 280 U.S. 610. Cf. *Goodyear Inv. Corp.* v. *Campbell*, 139 F.2d 188, 191 (C.A. 6th); *Zonne* v. *Minneapolis Syndicate*, 220 U.S. 187, 190, 191; *United States* v. *Emery*, 237 U.S. 28; *McCoach* v. *Minehill Railway Co.*, 228 U.S. 295.

The test to be applied in ascertaining whether a corporation is engaged in trade or business within the United States has been regarded as having both qualitative and quantitative aspects. *Scottish American Investment Co.* v. *Commisisoner*, 12 T.C. 49, 59; *Linen Thread Co.* v. *Commissioner*, 14 T.C. 725; *Lewellyn* v. *Pittsburgh, B. & L. E. R. Co.*, 222 Fed. 177 (C.A. 3d); 8 Mertens, Law of Federal Income Taxation, Section 45.25. However, the mere fact that a corporation enters into isolated transactions, or transactions which are unrelated either (1) to the purpose as announced in its charter or (2) to the general "pursuit of profit and gain" (*Von Baumbach* v. *Sargent Land Co., supra,* p. 516), does not mean that it is "engaged in trade or business".

In the *Section Seven Corp.* case, *supra*, this Court agreed (p. 158) "with the other courts which have considered this problem that there is, perhaps, no precise formula whereby all cases * * * might readily

be resolved, *and that each case must be decided upon its own facts*". (Emphasis supplied.) In this connection, taxpayer in the instant case does not charge that the Tax Court failed to follow the applicable statute or Regulations; nor, on proper analysis, can it be charged that there was any clear-cut mistake of law in the application of Section 231 (b) of the 1939 Code, since, as we have already noted and as will be demonstrated below, the Tax Court did take into consideration and regard, as a whole, all of taxpayer's activities, and in the light of its declared business purpose. Accordingly, absent any showing that the Tax Court's findings and ultimate conclusion were clearly erroneous, the Supreme Court's admonition in *Commissioner* v. *Scottish American Co.*, 323 U.S. 119, concerning the appellate function *in this type of case* has some relevance (despite the subsequent abandonment of the so-called *Dobson* rule). In the *Scottish American Co.* case the question, as here, was whether the Tax Court, as a matter of law, had improperly classified certain entities as resident foreign corporations; the Court stated that the case (p. 125)—

> exemplies one type of factual dispute where judicial abstinence should be pronounced. The decision as to the facts in this case, like analogous ones that preceded it, is of little value as precedent. The factual pattern is too decisive and too varied from case to case to warrant a great expenditure of appellate court energy on unravelling conflicting factual inferences. The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should thus be given wide range in such proceedings.

B. *The facts*

Judged by the aforementioned criteria, the Tax Court correctly decided that taxpayer was not "engaged in trade or business within the United States" during the taxable years, within the meaning of Section 231 (b) of the 1939 Code. On the basis of the whole record before it, it in effect held that the transactions testified about were (R. 52) "of an isolated and noncontinuous nature"; were "not entered into for profit"; did not, and "in all probability" could not, "result in a profit", and that in fact (R 53) "only items accounting for a fraction of 1 per cent of petitioner's total income represent those which *by any stretch of imagination could be considered business*". (Emphasis supplied.)

True, the taxpayer reported gross income from sources within the United States, in the following amounts (R. 47): 1948—$817,791.39; 1949—$605,635.10; 1950—$446,863.19. But only a tiny fraction of those amounts, less than 1 per cent, reflected transactions which the Tax Court would place in the category of business activity. And even those transactions, in the Tax Court's view (R. 53), "resulted in no substantial gain, and considering the time spent on them * * * could not, and in several instances actually did not, result in even a nominal net profit."

The record substantiates this *composite* picture of taxpayer's activities. Taxpayer received substantial amounts of dividends from Servel and Electrolux: $823,635.50 in 1948;[3] $602,125.20 in 1949; $441,624

[3] The difference between the total amount of the dividends received ($823,635.50) and the gross income reported

in 1950. If it qualified as a resident foreign corporation, i.e., if it was "engaged in trade or business within the United States" in the statutory sense, taxpayer would be entitled to substantial dividends received credits; but if it did not so qualify, it would not be entitled to the credits. Hence the practical importance to it of attempting to qualify as a "foreign corporation engaged in trade or business within the United States"—an attempt which the Tax Court considered was apparently admittedly (R. 54) "dictated not by a business objective but purely by a desire to save taxes." In the instant case, the fact that taxpayer's receipt of dividends from the Electrolux and Servel corporations represented approximately 99 per cent of its gross income surely warranted inquiry whether taxpayer fell—as the Tax Court in effect concluded it did—within that category (H. Rep. 2333, 77th Cong., 1st Sess., p. 103 (1942-2 Cum. Bull. 372, 449-450)) "of foreign corporations which are substantial holders of the stock of domestic corporations" and which *purportedly* engage in "other economic activities in the United States"—in order to "secure the very different tax treatment accorded taxpayers" who are "subject to tax at the corporate rate applicable to domestic corporations." As the Tax Court correctly observed, Congress, in enacting the 1942 amendment to the statutory provision here

---

($817,791.39), or $5,844.11, reflected a reported net loss resulting from sales of property other than capital assets. In 1949, only $3,509.90 of taxpayer's reported gross income represented "Other income in the United States." In 1950, in addition to the dividends received, it reported only $5,-239.19 as income "From Sales." (R. 47.)

involved, left (R. 53) "little room for doubt * * * that a foreign corporation merely *servicing its investments in this country* was *not* the type of taxpayer to which * * * section [231 (b)] was intended to refer." (Emphasis supplied.) If the Tax Court's view of taxpayer's activities (other than the collection of dividends) is correct, they amounted to little more than a tax-saving-motivated attempt to qualify the collection of dividends as business activity within the special meaning of the statute.

But from a realistic point of view, other than collecting the substantial amount of dividends in the taxable years, taxpayer did little, if anything, that was designed "to realize a profit" in connection with "what it was principally organized to do." *Section Seven Corp.* v. *Anglim, supra*, p. 158. This does not mean, of course, that the other transactions entered into were not in fact what they appeared to be in form; taxpayer confuses the issue by suggesting that the Tax Court considered otherwise. It does mean, however, that the fact that certain transactions were entered into is not *alone* conclusive of the issue, but leaves open the question whether, considering all the circumstances, all of the transactions entered into constituted doing business in the United States in the statutory sense. As the Tax Court succinctly noted (R. 54-55), "we may regard the transactions as 'substantive' in the sense that the operations described were actually performed, just as they were so regarded in * * * *Gregory* [v. *Helvering*, 293 U.S. 465] * * * without concluding that they constituted the conduct of a business, that they rendered the pe-

titioner 'busy' or that they were engaged in for a livelihood or profit." [*Flint* v. *Stone Tracy Co., supra*]; *Spermacet Whaling & Shipping Co.* v. *Commissioner*, decided June 13, 1958 (1958 P-H T.C. Memorandum Decisions, par. 30.57).

Apart from the holdings of the shares of stock of Electrolux and Servel, and the collection of dividends thereon, the Tax Court found that taxpayer indulged in activities which—having in mind the purpose for which taxpayer was organized—were deemed to have had no (R. 54, 55) "business objective", and in addition, no such "consistency" or "frequency * * * which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue." As the Tax Court understood Turnbow's testimony, Turnbow became interested in erecting recombined milk plants in foreign countries after he had become acquainted with Wenner-Gren in Mexico when he (Turnbow) erected a recombined milk plant in which Wenner-Gren had a financial interest. According to Turnbow, it was hoped (R. 45-46):

> that petitioner would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to secure funds, but without any voice or activity in the operations of the plants.[4]

---

[4] Turnbow's verbatim testimony as to the reason for taxpayer's organization was as follows (R. 203):

Continental Trading—I have nothing to do with Con-

Taxpayer itself described its activity as "Investment." (R. 55.) The fact is, however, as the Tax Court found, that taxpayer (R. 46) "never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and

---

> tinental Trading except I got these people that owned it—I sold them on an idea, at least I thought I had, to be the financial house to make it to get the money to build these—to carry the finances in to do these dairy jobs in foreign countries. They had nothing to do with the operations of milk plants, they had nothing to do, but were simply a financial house only. They had money and—some money, and I tried to make that available for the purpose of financing these various dairy companies.

Taxpayer's brief (p. 34) concedes that "In the case at bar, * * * petitioner's intention was clearly to make money on dividends while developing in the United States a program for investment as a participant in the production of recombined milk * * *." (The remaining portion of the statement, relating to the alleged prospective sales of cans, is dealt with at another point in this brief.)

The stipulation sets forth the purposes for which taxpayer was organized, as follows (R. 21-22):

> To manufacture, produce and process and to buy, sell, distribute, consign and otherwise dispose of and deal in, at wholesale and at retail, all kinds of milk and milk products; to manufacture, buy, produce and process, and to buy, sell, distribute, consign and otherwise dispose of, at wholesale and at retail, all kinds of food and food products, to raise, buy, sell, distribute and deal in, all kinds of garden, farm and dairy products; to raise, buy, sell and otherwise deal in and dispose of cattle and all other kinds of livestock; to manufacture, lease, buy, sell, deal in, consign and otherwise dispose of machinery, tools, implements, apparatus, equipment, and any and all other materials, supplies, articles and appliances used in connection with all or any of the purposes aforesaid, or in connection with the sale,

borrowings for this or any related purpose." The program failed to materialize because of the inability to reconvert foreign currency into American dollars, and because of the instability of foreign currencies. (R. 45.)

Nor were any of taxpayer's activities (the collection of dividends aside) related in any substantial way to the making of profit, or to any of the purposes for which taxpayer was mainly created. True, during the taxable years taxpayer made payments of principal and interest on outstanding loans; it also borrowed substantial amounts. But they were payments on account of the liabilities of Wenner-Gren which taxpayer had assumed upon transfer to it of the Servel and Electrolux stock. As to the loans, the Tax Court found that the $1,000,000 borrowed in 1948 from the Bank of America was used by Wenner-Gren to acquire Mexican telephone companies; that $1,100,000 of the $1,850,000 borrowed in 1948 from

---

transportation or distribution of any or all goods, wares, merchandise or other personal property dealt in or disposed of or handled by the corporation.

To subscribe for, or cause to be subscribed for, buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, acceptances, drafts and evidences of indebtedness issued or created by other corporations, joint stock companies or associations, whether public, private or municipal, or any corporate body, and while the owner thereof to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including any rights to vote thereon.

the Bank of America was used to repay the prior indebtedness of Wenner-Gren to that bank, the remaining $750,000 being used to make payments of principal and interest on other outstanding indebtedness; that the $1,700,000 borrowed from the Bank of America in 1949 was used to liquidate the outstanding balances of two loans from the bank; that the bulk of $2,000,000 borrowed from the Central Hanover Bank was used to repay the aforementioned loan of $1,700,000 from the Bank of America. The Tax Court found that not only did taxpayer never undertake (R. 46) "any activity in connection with the establishment of * * * [any] recombined milk plants" but "*never used its assets and borrowings for this or any related purpose*"; further, that the (R. 49) "funds borrowed by petitioner were in the main used by Wenner-Gren", and that "Turnbow [taxpayer's president] had no direct knowledge of their use." (Emphasis supplied.) Turnbow, asked whether he knew what use had been made of the borrowed funds, replied (R. 215):

> Only indirectly to some extent. I know that they were used by Axel.

There are three additional categories of transactions upon which taxpayer rests its claim of doing business within the United States during the taxable years:

(1) In July 1948, taxpayer purchased a carload of dry milk fat from Kraft Foods Company for $46,-212.75, resold the fat one month later to Kraft Company for $40,248, and reported a loss on the transac-

tion in its 1948 return. Any intimation that that transaction, considered either alone or in connection with all the other transactions, constituted doing business within the meaning of the statute disappears upon examination of the evidence. Turnbow testified on cross-examination that taxpayer could *not* have used the fat in making recombined milk, because (R. 252) "at the time of that transaction * * * the recombined plants weren't in operation". In any event, as the Tax Court understood the testimony with respect to this item, the transaction was (R. 49) "of a type in which * * * [taxpayer] was not previously nor subsequently engaged". It was truly an isolated transaction, in which, as taxpayer concedes (Br. 31), it suffered a loss of some $6,000.

(2) In 1950, taxpayer purchased, *as an accommodation to a Mexican corporation,* equipment for that corporation for which it was reimbursed without profit. The Tax Court was obviously justified in refusing to attach any signficance to that transaction, since it apparently had no relationship to the purposes for which taxpayer was organized.

(3) In 1948, 1949 and 1950, the only other activity which taxpayer reported was represented by nominal amounts of income resulting from transactions relating to cans used by the International Dairy Supply Company, of which Turnbow was president and sole stockholder. These transactions, accounting for only $120.64 of reported income for 1948, $3,509.90 for 1949, and $5,239.19 for 1950, amounted to little more than an interposition, without any substantial business purpose, between International Dairy Supply

Company and Western Can Company. It was clear from the Tax Court's findings of fact as to this transaction (R. 50-51) that although the transactions were real in the sense that they actually occurred they were (R. 54-55) "dictated not by a business objective but purely by a desire to save taxes"; they were " 'substantive' in the sense that the operations described were actually performed", but they did not constitute "the conduct of a business", did not render taxpayer "busy", nor were they "engaged in for a livelihood or profit." Cf. *Gregory* v. *Helvering*, 293 U.S. 465; *Linen Thread Co., supra.* The record discloses that beginning in 1948 the International Dairy Supply Company (referred to as Supply) found it necessary to obtain tin cans in connection with its contract for supplying recombined milk products to troops in the Far East. The contract spelled out the specifications for the necessary cans to be bought in the United States. In 1948, Supply procured the cans from the Western Can Company (referred to as Western). An employee in Supply's procurement department telephonically ordered the cans, following up with a written purchase order. Supply received shipments for which it paid by check. In December of 1948, taxpayer undertook to place with Western, in its own name, an order covering precisely the same type of cans and bearing the same markings as Supply had theretofore ordered in its name from Western. Western billed taxpayer at the same price which Supply had paid Western on an earlier order. Taxpayer's order was first telephoned to Western either by Supply's procurement depart-

ment or by Turnbow's secretary. Western's salesman who received the order filled out an order form in the name of Supply; taxpayer's name was added later. On the day that the order was telephoned to Western, Supply prepared an export purchase order for the cans, addressed to taxpayer. Supply had used the same form in preparing its orders which theretofore had been directly forwarded to Western. Taxpayer then forwarded to Western a written confirmatory order in its name. Taxpayer's check of December, 1948, represented payment in full to Western. Supply paid an invoice on taxpayer's leterhead at a 5% increase in price. The same procedure with respect to the recording and routing of orders for cans was followed on 37 occasions in 1949, and on approximately 48 occasions in 1950. As in 1948, taxpayer billed Supply 5% more than it was billed by Western. Taxpayer never used its Nevada office in any of these can transactions; it carried no inventory of cans; it ordered no cans other than those used by Supply; and in every instance in which Supply acquired cans in this manner it paid taxpayer within 10 days of taxpayer's payment to Western. (R. 50-51.) Turnbow sought to explain (R. 207-208) "why international Dairy Supply, after it had engaged in the operation of acquiring cans directly from Western Can Company, then sought to introduce Continental Trading into the picture." The explanation [5] does not ap-

---

[5] Turnbow stated (R. 207-208):

> Why, I thought it was a free country, private free enterprise, and I don't think there is any law that tells me to buy from you or you or you. There is nothing

pear convincing, and would seem to lend support to the Tax Court's conclusion that the can transactions had no substantial business purpose, but were entered into in order to qualify taxpayer, formalistically, as a resident foreign corporation; i.e., they were motivated (R. 54) "purely by a desire to save taxes."

II

The Tax Court Correctly Denied Taxpayer's Motion for Leave To File A Motion To Vacate the Decision, To Reopen the Proceeding, and To Take Further Testimony

The Tax Court entered its decision on September 6, 1957, and served it upon the parties on the same day. (R. 56.) Rule 19 (e) and (f) of the Rules of Practice of the Tax Court (Rev. January 15, 1957) provides as follows:

> RULE 19. MOTIONS.
>
> * * * *
>
> (e) No motion for retrial, further trial, or reconsideration may be filed more than 30 days after the opinion has been served, except by special leave.

> about that, so undoubtedly it was a good business decision, in which I probably made the decision, with their approval, to buy the cans. I am sure they would take the approval because I think they got five per cent *market*, which is a very small amount of money. We tied their money up, see.

The fact is, however, that taxpayer's money was not tied up, for within ten days or less after taxpayer sent its checks to Western, it received checks in like amount plus about five per cent from Supply.

(f) No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

The taxpayer's motion for leave to file a motion to vacate the Tax Court's decision, to reopen the proceeding, and to take further testimony was not filed until November 19, 1957 (R. 79-80), more than 30 days after the opinion had been served and the decision entered. The Tax Court, in effect refusing to grant *special* leave to file the motion, denied it. (R. 80.)

Aside from the admitted facts that (1) the motion was untimely, and (2) in the circumstances, the granting of the motion was a matter for the exercise of the Tax Court's discretion,[6] it is clear that, except for a mere conclusory statement that new evidence had been discovered, the taxpayer failed to submit with its motion for leave to file a motion any information which might have afforded a possible ground for the granting of the motion, even if it had been timely made. At the hearing on the motion, taxpayer's counsel, admitting that (R. 265) "The motion as it is * * * [is based on] newly-discovered evidence", requested permission to indicate orally "rather briefly and quickly some of these items of newly-dis-

---

[6] Taxpayer's present counsel stated to the Tax Court (R. 258):

> We recognize that right at the outset the 30-day period provided by this Court's rules for filing motions for reconsideration has run. Therefore, I take it, this is purely and simply a discretionary matter with this Court, as to whether or not they will permit us to file our motion.

covered evidence we are talking about, and perhaps put this thing in focus". Asked by the court: "Do they appear in the motion papers?", counsel replied: "No, they do not". Counsel further stated that because he had realized (R. 266):

> * * * the potential defectiveness of my position, in the sense I couldn't spell out * * * [in the motion] the facts I am talking about, I asked * * * two gentlemen to be here available today, so you wouldn't have to take my word for it, so if you cared to you could hear their sworn testimony. And I would suggest it would come under the broad language I attempted to use, namely, that there is newly-discovered evidence.

The Government, objecting to any further delay (R. 268), took "the position that the motion *on its face* is what we are arguing today". (Emphasis supplied.) The Tax Court said (R. 270):

> The government said to you as I understand it, you get the motion up, we will hear it and consent to short notice. Now, you are coming in and saying the motion wasn't completed in time, in effect it seems to me that is what you are saying. A motion is supposed to be supported by some kind of adequate material to justify the granting of the motion on the facts shown, at least the prima facie showing. I don't say that the affidavits would necessarily * * * be final proof of what was in them, but at least there would be something in the record. *Now, there is nothing in the record.* (Emphasis supplied.)

In the court's view, to have granted the motion for leave to file a motion would not only (R. 266) "in

effect be encouraging dilatory proceedings", it would also mean that if the motion was granted on the basis of what had been submitted therewith (and not on the basis of the proferred statement of counsel or witnesses) the court would "have [had] to take things for granted that are presumably an essential part of the considerations on the basis of which any motion like this could be granted"; further, to grant the motion for leave to file a motion on the basis of material not submitted with it, in order, ultimately, to have a further hearing in the matter, would in effect be (R. 267) "to have the further hearing" then and there. We submit that in the circumstances the Tax Court's denial of the motion was entirely justified, and involved no abuse of its discretion.

Even if it is assumed, *arguendo*, that the motion for leave to file a motion should have been granted, there is nevertheless grave doubt whether the taxpayer's proffer as to the alleged newly-discovered evidence (R. 271-280) showed any substantial basis for vacating the decision and reopening the case. Taxpayer's counsel stated that at the trial of the case below Mr. Turnbow, the taxpayer's president, had failed to disclose certain matters, some of which (R. 271) "conceivably are matters about which he knew nothing". Admittedly, "some of them * * * [were] matters of which * * * [Turnbow] personally had knowledge and conducted various negotiations". However, analysis of counsel's complete statement on this subject (R. 271-280) fails to disclose that there were any matters which would qualify as "newly-discovered" in any meaningful sense as of the words.

Taxpayer's counsel in effect admitted as much. (R. 274.) Replying to the court's suggestion that the alleged newly-discovered evidence was in fact in existence at the time of the trial of the case, was known to the taxpayer's officers, and could have been put in evidence at the hearing, counsel said that that was (R. 275) "Perhaps * * * a fair statement", even though adding "although certainly it depends on how you interpret 'newly-discovered'." Moreover, the Tax Court pointed out, the alleged newly-discovered evidence seemed to have been not (R. 275) "really newly-discovered by anybody but" counsel himself, and not by the taxpayer or any of its officials (R. 274) "or even by the prior lawyer". The implication of this observation was that, even though present counsel may have correctly ascertained that prior counsel should have proffered certain material at the trial, that was no warrant for characterizing the material as newly discovered; nor was it a sufficient basis for extending the time limit for vacating the decision in order to reopen the case for further proceedings. As the Tax Court observed (R. 280):

> There is a clear implication in the rules, at least, that the engaging of new counsel is not a reason for doing away with a time limit which otherwise appears in the rule. That is the result of a combination of rules 19, 20 and 27.[7]

---

[7] The pertinent provisions of Rule 19 are as follows:

RULE 19. MOTIONS

* * * *

(e) No motion for retrial, further trial, or recon-

The Tax Court also warned that if, in the circumstances of this case, a motion for leave to file a motion was granted simply because new counsel considered that evidence should have been presented at the trial which was not presented, but which was available (R. 280)—

> sideration may be filed more than 30 days after the opinion has been served, except by special leave.
>
> (f) No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.
>
> Motions covered by (e) and (f) shall be separate from each other and not joined to or made a part of any other motion.

Rule 20 of the Tax Court provides, among other things, as follows:

> RULE 20. EXTENSIONS OF TIME
>
> (a) An extension of time * * * may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth *good and sufficient cause* therefor or may be ordered by the Court upon its own motion. (Emphasis supplied.)

Rule 27 provides, among other things, as follows:

> RULE 27. PLACE, TIME, AND NOTICE OF HEARINGS AND TRIALS—ATTENDANCE AND CONTINUANCES
>
> * * * *
>
> (c) *Continuances—Motions—Trials.*—
>
> (1) Court actions on cases set for hearing on motions or trial will not be delayed by a motion for continuance unless it is timely, sets forth *good and sufficient cause,* and complies with all applicable Rules. (Emphasis supplied.)
>
> (2) Conflicting engagements of counsel *or the employment of new counsel* will never be regarded as good ground for a continuance unless set forth in a

> it would, for no reason other than the substitution of new counsel * * * make it possible for the cases in Tax Court to be indefinitely prolonged, to be reopened, or innumerable motions to be made, first on one ground, and then on another * * *.

Taxpayer's contentions with respect to this issue (Br. 56-63) are not convincing. (1) While it is true that Axel Wenner-Gren had not been called as a witness at the trial, it was not demonstrated below that he was (a) unavailable, or (b) would have appeared as a witness. At the hearing on the motion taxpayer's counsel stated that (R. 263) "Mr. Axel L. Wenner-Gren, himself, would be willing to testify in a proceeding relating to this company, and in fact would have testified at the prior hearing had he been requested to"; the Tax Court, however, was quick to point out that it could find no "statement in Mr. Wenner-Gren's affidavit, that he *would have appeared*" at the hearing, if called; and similarly, there was "no

---

> motion filed promptly after the notice of hearing or trial has been mailed or unless extenuating circumstances are shown which the court deems adequate. (See Rule 20.) (Emphasis supplied.)

The Tax Court also stated an additional reason why it could not (R. 280)—

> even get beyond the motion for leave [since the] motion that is proposed to be made doesn't accord with the Rules of the Tax Court; particularly Rule 19, which provides that motion for further trial, and so on, shall not be combined with a motion to vacate a decision.

The motion to vacate the decision below in this case was combined with the motion to ~~state~~ take further testimony. (R. 81-82.)

statement under oath that * * * he *would appear* in a new proceeding." (Emphasis supplied.) (2) Even if it is true that (Br. 60) "an incomplete presentation of facts was made to the Tax Court [by prior counsel], and * * * moreover, some of the facts were inadequately if not inaccurately presented", surely ineptness of presentation by prior counsel, unfortunate though it may be to the taxpayer, affords no basis for a new trial. Any contrary rule would obviously frustrate the established policy against multiplicity of trials, as well as "the established policy against piecemeal review" of cases. *United States* v. *Fauci*, 242 F. 2d 237, 238 (C.A. 1st). (3) And these same considerations would militate against the granting of a new trial on the ground—asserted by taxpayer at the argument on the motion, and now only intimated (Br. 61)—that the case had been tried by prior counsel on a (R. 261) "misconception of what the real legal issue was in this case". The two cases (Br. 61-62) cited to support the contention that a new trial should be granted on such a dubious ground are clearly inapposite, even if it is assumed, *arguendo* (as taxpayer urges) that the criteria laid down in Rule 60 of the Federal Rules of Civil Procedure are, as a matter of law, binding on the Tax Court. But see *Katz* v. *Commissioner*, 188 F. 2nd 957, 959 (C.A. 2nd). The simple fact is that if it is true, as taxpayer now states, that the court below reached its conclusion (Br. 63) "upon incomplete and partially inaccurate facts", taxpayer has only itself to blame for failing to present, completely and accurately, *all* of the facts which were available to it at the hearing on the merits, none of

which, by any proper definition, constituted "newly-discovered" evidence at the time of the hearing on the motion.[8]

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
A. F. PRESCOTT,
MEYER ROTHWACKS,
Attorneys,
Department of Justice,
Washington 25, D. C.

JULY, 1958.

---

[8] As taxpayer concedes (Br. 64), there is no issue before this Court respecting the deductibility of alleged items of interest, expenses, and losses on sale of property.

APPENDIX

Internal Revenue Code of 1939:

SEC. 231 [As amended by Sec. 104 (d), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 160, Revenue Act of 1942, c. 619, 56 Stat. 798]. TAX ON FOREIGN CORPORATIONS.

* * * *

(b) *Resident Corporations.*—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in Section 14 (c) (1) and Section 15.

* * * *

(26 U.S.C. 1952 ed., Sec. 231.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.231-1. *Taxation of Foreign Corporation.*— * * *

* * * *

(b) *Resident Foreign Corporations.* * * *

* * * *

As used in Sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year. * * *

* * * *

SEC. 29.231-2. *Gross Income of Foreign Corporations.*— * * *

* * * *

(b) *Resident Foreign Corporations.*— * * * A foreign corporation which effects transac-

tions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian is not merely by reason of such transactions considered as being engaged in trade or business in the United States which would cause it to be classed as a resident foreign corporation. However, a foreign corporation which at any time within the taxable year is otherwise engaged in trade or business in the United States, being a resident foreign corporation, is taxable upon all income derived from sources within the United States, including the profits realized from such transactions. A resident foreign corporation is also required to include in its gross income capital gains, gains from hedging transactions, and profits derived from the sale within the United States of personal property, or of real property located therein.

☆ U S GOVERNMENT PRINTING OFFICE: 1958 472908 56